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COMMISSION ON HUMAN RIGHTS

Intersessional open-ended working group
on a draft optional protocol to the
Convention on the Rights of the Child
on the sale of children, child
prostitution and child pornography, as
well as the basic measures needed for
their prevention and eradication
First session, 14-25 November 1994

COMMENTS ON THE GUIDELINES FOR A POSSIBLE DRAFT OPTIONAL PROTOCOL

Report of the Secretary-General

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Introduction

1. In paragraph 17 of its resolution 1994/90, entitled "Need to adopt effective international measures for the prevention and eradication of the sale of children, child prostitution and child pornography", the Commission on Human Rights decided to establish an open-ended intersessional working group of the Commission responsible for elaborating, as a matter of priority and in close collaboration with the Special Rapporteur on the sale of children, child prostitution and child pornography and the Committee on the Rights of the Child, guidelines for a possible draft optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, as well as the basic measures needed for their prevention and eradication.

2. In paragraph 18 of the resolution, the Commission requested the Secretary-General to invite Governments, intergovernmental organizations, the Special Rapporteur, the Committee on the Rights of the Child and non-governmental organizations to send comments on the guidelines for a possible draft optional protocol, for consideration by the working group, and to circulate these contributions to Governments in advance of the meeting of the working group.

3. Pursuant to that resolution, the Secretary-General, on 6 June 1994, addressed requests to Governments, intergovernmental and non-governmental organizations concerned, as well as to the Special Rapporteur on the sale of children, child prostitution and child pornography and the Committee on the Rights of the Child for comments on the guidelines for a possible draft optional protocol.

4. By 26 September 1994, replies had been received from the Governments of the following States: Argentina, Australia, Bahrain, the Federal Republic of Yugoslavia and the Philippines.

5. Replies were also received from the Crime Prevention and Criminal Justice Branch, the United Nations Children's Fund, the United Nations Population Fund, the Office of the United Nations High Commissioner for Refugees, the United Nations Educational, Scientific and Cultural Organization and the Council of Europe. The following non-governmental organizations submitted comments: Action for Children Campaign, Defence for Children International and the International Catholic Child Bureau, and the Salvation Army.

6. The present report contains a summary of the substantive replies received. Any additional comments received will be issued as addenda to this document.

I. COMMENTS RECEIVED FROM STATES

Argentina

[Original: Spanish]
[11 August 1994]

7. The Argentine Republic has been a party to the Convention on the Rights of the Child since its entry into force on 4 January 1991. It has also been bound since 7 November 1986 by the 1966 International Covenants on Human Rights; since 17 March 1957 and 26 May 1987, respectively, by the Geneva Conventions and Protocols on international humanitarian law; since 1 March 1961 by the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; and, since 13 August 1963 by the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

8. The Argentine legislation currently in force deals only in part with the matters referred to in the note. In the context of offences against freedom, article 146 of the Penal Code sanctions the abduction, holding and concealment of children under the age of 10 years with a penalty of 3 to 10 years of ordinary or rigorous imprisonment. A peaceful national doctrine views this type of offence as "based on the concept of child theft, consisting in the theft or abduction of a child in order to keep him or her or to cause the child to lose the effects of his or her origin and the possession of his or her real and effective existence" (cf. Carlos Fontán Balestra, Tratado de Derecho Penal, Buenos Aires, Abeledo Perrot, 1969, p. 303). In the area of offences against civil status, article 138 provides for a penalty of imprisonment for six months to two years to be imposed upon anyone who, through any act, renders uncertain, modifies or abolishes the civil status of another person, with the aim of causing that person harm.

9. Nevertheless, there would appear to be a gap in Argentine law, having regard to the new and perverse forms of offences against children. This has led a number of legislators to submit draft legislation designed to remedy this gap in the law. This includes the bills submitted by Senator Ricardo Lafferière (S-1247/92), Senator José Antonio Romero Feris (S-1256/92) and Senator Pedro Molina (S-31/93). These three bills were considered jointly by the originating Chamber, the Senate, where they were approved without amendment. The Chamber of Deputies, acting as review body, considered the bills late in 1993 and returned them to the Senate where they are to have a second reading.

10. In the light of the foregoing, the Argentine Republic expresses its interest in the drawing up of a protocol dealing specifically with questions relating to the sale of children, the prostitution and use of children in pornography and the basic measures necessary for the prevention and eradication of these acts.

Australia

[Original: English]
[12 and 19 August 1994]

11. The Parliament of Australia has recently enacted the Crimes (Child Sex Tourism) Amendment Act 1994. The Act means that Australian citizens or residents can be prosecuted under Australian law for offences involving sexual acts with children committed outside Australia. Further, such persons, or companies domiciled in Australia, can also be prosecuted for the promotion or organization of tours directed at the commission of such acts.

12. Australia is a very strong supporter of the concept of a protocol on the sale of children, child prostitution and child pornography. This is reflected in its domestic legislation referred to above. The following comments relate to the draft optional protocol attached to the report of the Second International Workshop on National Institutions for the Prevention and Protection of Human Rights (E/CN.4/1994/45/Add.1) referred to in Commission on Human Rights resolution 1994/90 of 9 March 1994. Australia considers this to be an appropriate starting point for the work of the working group.

Article 1

13. The reference to "crimes of sexual exploitation" is very general. It should be considered to cover such things as the employment of children as prostitutes or their use in pornographic films and videos, as well as extending to the sexual abuse of children and incest. Any definition should be inclusive to avoid excluding categories of abuse by implication. It may also be worthwhile to provide a definition of "trafficking" as it is not clear whether intercountry adoption or surrogacy for commercial gain would be covered (see arts. 11 and 21 of the Convention on the Rights of the Child).

14. The term "crimes against humanity" has a clearly defined and understood meaning in international law. It was used to define certain crimes committed in the course of the Second World War that were not war crimes strictly called, and embraces essentially crimes of persecution or extermination on the grounds of race or ethnic origin. In our view, the term should continue to be so confined and not extended to cover crimes of sexual exploitation of or trafficking in children, as suggested in the draft protocol. There is no need to define a crime as a crime against humanity for it to be a crime in international law in relation to which universal jurisdiction may exist. See, for example, the crime of genocide and the crime of piracy, neither of which are defined as a crime against humanity.

Article 2

15. Article 2 (a) would require States parties to recognize the principle of "universal criminal jurisdiction" in relation to crimes of "sexual exploitation of, or trafficking in, children". The normal practice, which we support, in treaties establishing international crimes, such as those on torture, hijacking, drug trafficking etc., is not to refer to universal jurisdiction as such but rather to establish a system whereby States parties are under an obligation to extradite or punish persons found in their

territory who are alleged to have committed the relevant offences. In our view, it is desirable to follow a model more closely aligned to these other conventions than the simply proposition set out in article 2 (a).

16. Article 2 (b) would require States parties to enter into appropriate bilateral and multilateral arrangements to give effect to the principle of universal criminal jurisdiction. As noted in the previous paragraph, we consider it would be better to establish an appropriate extradition regime in the protocol itself.

Article 3

17. The chapeau to article 3 refers to a framework of bilateral and multilateral arrangements as the basis for cooperation between States parties. We would not support the negotiation of separate agreements to facilitate cooperation. Rather, a regime for mutual assistance should be established in the protocol.

18. Paragraph 3 (a), (b) and (c) focuses on mutual cooperation in the investigation, prosecution and punishment of offenders. These are very general provisions which will require detailed work to ensure that they provide for effective mutual assistance between States parties. Useful precedents would be the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the Model Treaty on Mutual Assistance in Criminal Matters.

Article 4

19. Consideration should be given to including a requirement to offer treatment to persons convicted of offences covered by the protocol, to prevent the repetition of such crimes. Such treatment would fall within the term "all appropriate measures" in article 34 of the Convention on the Rights of the Child.

Bahrain

[Original: English]
[30 August 1994]

20. The Government of the State of Bahrain, as a signatory to the Convention on the Rights of the Child, shares the international concern at the exploitation of children, supports the efforts of the United Nations to address the issues concerned and to protect children from such exploitation and is pleased to inform the Secretary-General that there is no child prostitution, child pornography, sale or other forms of exploitation of children in Bahrain, nor are any persons under the age of 18 recruited into the armed services, all of such matters being contrary to Bahrain's laws and culture.

Federal Republic of Yugoslavia

[Original: English]
[2 September 1994]

21. The Government of the Federal Republic of Yugoslavia is aware of the seriousness and gravity of the problem of the sale of children, child prostitution and child pornography, especially in certain regions of the world and, accordingly, supports every international effort aimed at mitigating and reducing these unwanted phenomena. It is in that context that the Government of the Federal Republic of Yugoslavia sees paragraph 17 of Commission on Human Rights resolution 1994/90, entitled "The need to adopt effective international measures for the prevention and eradication of the sale of children, child prostitution and child pornography". However, in view of the lengthy procedure for the preparation and adoption of an optional protocol on these problems on the one hand, and the magnitude of the problem, on the other, we are of the opinion that it would be more expedient to invest additional efforts to introduce, as soon as possible, the already existing standards and programmes of activities, such as the Programmes of Action for the prevention of the sale of children, child prostitution and child pornography, and for the elimination of the exploitation of child labour and the mechanisms for their application, into the national legislations of States Members of the United Nations. We believe that the Working Group on Contemporary Forms of Slavery of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and the Special Rapporteur on the sale of children, child prostitution and child pornography have a special role to play in this.

22. The Government of the Federal Republic of Yugoslavia fully understands the efforts of the General Assembly, the Commission on Human Rights, the Committee on the Rights of the Child and the Secretary-General personally, comprehensively to identify the problems of children affected by war conflicts and to take all specific measures possible to mitigate the plight of these children. To this end we support the efforts for the taking of measures for the universal ratification of the Convention on the Rights of the Child by 1995 and for its efficient implementation and we join in the appeal to countries that have made reservations in respect of the Convention which are contrary to the aim and purpose of the Convention itself to withdraw such reservations as soon as possible.

E. Philippines

[Original: English]
[20 September 1994]

23. The Philippine Government has enacted Republic Act No. 7610, "An Act Providing for Stronger Deterrence and Special Protection against Child Abuse, Exploitation and Discrimination, Providing Penalties for its Violation and for Other Purposes". This is in compliance with the provisions of the Convention on the Rights of the Child which was ratified by the Philippine Government on 21 August 1990.

24. Republic Act No. 7610, among other things, defines and penalizes child abuse, child exploitation, child prostitution, trafficking and pornography, as

well as other forms of child abuse (arts. 1-3). Under the law, children, who for money or other consideration, indulge in sexual intercourse or lascivious conduct, are deemed to be children exploited in prostitution and the penalty of reclusion temporal in its medium period (ranging from 14 years, 8 months and 1 day to 17 years and 4 months imprisonment) to reclusion perpetua (life imprisonment) shall be imposed on the following:

(a) Any person who engages in or promotes, facilitates or induces child prostitution;

(b) Any person who commits the act of sexual intercourse or lascivious conduct with a child exploited in prostitution;

(c) Those who derive profit or advantage from child prostitution, whether as a manager or owner of the establishment where the prostitution takes place (sect. 5, art. III, RA 7610).

25. The law likewise defines and penalizes a mere attempt to commit child prostitution when any person who, not being a relative of a child, is found alone with the said child inside the room or cubicle of a house, an inn, hotel, motel, or pension house, apartelle or other similar establishment, vessel, vehicle or other secluded area under circumstances which would lead a reasonable person to believe that the child is about to be exploited in prostitution or other sexual abuse. The term also includes a situation when any person receives services from a child in a sauna parlour or bath, massage clinic, health club or other establishment. A penalty lower by two degrees than that prescribed for the consummated felony under section 5 shall be imposed upon the principals of the attempted offence (sect. 6, RA 7610).

26. On the other hand, the law defines child trafficking as the act of engaging in trading and dealing in children, including, but not limited to, the act of buying and selling of a child for money or for any other consideration, or barter, and is penalized by reclusion temporal to reclusion perpetua. If the victim is under 12 years of age, the penalty shall be imposed in its maximum period (sect. 7, RA 7610). Like child prostitution, the law likewise defines and penalizes the attempt to commit child trafficking, under the circumstances enumerated in section 8 thereof.

27. Further, the law penalizes other acts of neglect, abuse, cruelty or exploitation and other conditions prejudicial to the child's development under the circumstances enumerated in section 10 thereof.

28. Other salient provisions of Republic Act No. 7610 are the establishment of programmes on child abuse, exploitation and discrimination (art. II); sanctions for establishments or enterprises (art. VII); provisions on working children (sec. VIII); children of indigenous cultural communities (art. IX); and children in situations of armed conflict (art. X). Indeed, even before the passage of Republic Act No. 7610, and prior to ratification by the Philippine Government of the Convention on the Rights of the Child, the Philippine Government had existing laws penalizing the sale or prostitution of children, as follows.

29. Article 340 of the Revised Penal Code defines and penalizes the crime of corruption of minors. Under this provision, any person who promotes or facilitates the prostitution or corruption of persons under age to satisfy the lust of another, shall be punished by "prison mayor" (from 6 years and 1 day to 12 years imprisonment), and if the culprit is a public officer or employee, including those in government-owned or controlled corporations, he shall also suffer the penalty of temporary disqualification.

30. Article 341 of the Revised Penal Code defines and penalizes the crime of white slave trade, and provides for the penalty of "prision correccional" (from 6 months and 1 day to 6 years imprisonment) to be imposed upon any person who, in any manner, or under any pretext, engages in the business or profits by prostitution or enlists the services of women for the purpose of prostitution.

31. Presidential Decree 603, also known as the Child and Youth Welfare Code, was the Philippines' child rights law, prior to the passage of Republic Act No. 7610. The Child and Youth Welfare Code is a compilation of the rights of the child and contains provisions protecting his rights and providing penalties for violation thereof.

32. Article 59 of the Code penalizes parents who sell or abandon their child to another person for valuable consideration or causes or encourages the child to lead an immoral or dissolute life.

33. On the other hand, article 95 of the Code mandates all civic associations to bring to the attention of the proper authorities the exhibition of indecent shows and the publication, sale or circulation of pornographic materials. It likewise mandates the Board of Censors, now the Movie and TV Review and Classification Board, to prohibit any movie, television or radio programmes offensive to the proprieties of language and behaviour. Further, commercial advertisements which are improper for children under 18 years of age due to their advocating or unduly suggesting immorality shall not be shown in any movie theatre nor shall they be used during or immediately before or after any television or radio programme for children.

II. COMMENTS SUBMITTED BY UNITED NATIONS BODIES, SPECIALIZED AGENCIES AND INTERGOVERNMENTAL ORGANIZATIONS

Crime Prevention and Criminal Justice Branch

[Original: English]
[24 August 1994]

34. The exploitation of children is a matter of grave concern, and the decision of the Commission on Human Rights to elaborate guidelines for the establishment of an optional protocol to the Convention on the Rights of the Child to address this issue is most welcome.

35. The working group may wish to take into consideration resolutions 3/1 and 3/2, on violence against women and children and the international traffic in minors, respectively, contained in the report on the third session of the Commission on Crime Prevention and Criminal Justice.

36. Through their exploitation in criminal activities, children are becoming an increasingly vital link in the international illicit profit-making chain. Criminal phenomena falling under this rubric are therefore especially disturbing, both because they constitute the exploitation of the weak and because they strengthen organized crime in a particularly insidious manner. Furthermore, because of their connection to transnational organized crime, the precise nature and scope of such forms of criminality and victimization are difficult to ascertain.

37. The victimization of children in the context of organized crime will be taken up at the forthcoming World Ministerial Conference on Transnational Organized Crime, to be held at Naples, Italy, on 21 to 23 November. The Ministerial Conference will report to the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which will take place at Tunis, from 3 to 14 April 1995, and the matter will receive further attention under the topic entitled, "Crime prevention strategies, in particular as related to crime in urban areas and juvenile and violent criminality, including the question of victims: assessments and new perspectives", as well as at the demonstration and research workshop on the prevention of violent crime. The working group may wish to take into consideration any conclusions or recommendations resulting from these meetings.

38. An expert meeting on the instrumental use of juveniles and human rights standards in the field of the administration of juvenile justice will be held at Vienna, from 31 October to 4 November, hosted by the Government of Austria and organized by the Centre for Human Rights, in cooperation with the Crime Prevention and Criminal Justice Branch and UNICEF. As the focus of this meeting will be, inter alia, the sale of children, child prostitution and child pornography, the working group may also wish to take into consideration any recommendations resulting from this meeting.

39. Any measure aimed at preventing and eradicating these forms of exploitive criminality should take into consideration the conditions of extreme poverty, which exist in many parts of the world as, more often than not, it is the exigencies of subsistence which compel families to involve children in such activities. In this regard, the working group might consider the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), which set out comprehensive preventive and protective multidisciplinary measures to offset conditions which adversely influence the healthy development of the child, focusing on the concept of "social risk", that is, those young persons who are abandoned, neglected, abused or in marginal circumstances.

40. The working group might also take into consideration the important function of raising public awareness regarding these forms of criminality. On the one hand, in any case of exploitation, the behaviour of the adult is grounded in the attitude that children are not yet "complete" human beings, but are objects which may, in negative circumstances, be subjected to control

or abuse. Multi-agency public awareness campaigns might challenge this attitude, which is addressed in the Riyadh Guidelines. On the other hand, heightened public awareness might help to eliminate the stigmatization experienced by many young persons who seek reintegration into mainstream society. For example, in societies where a high premium is placed on virginity, young girls entrapped in such activities are often further victimized by stigmatization. Moreover, as acquired immune deficiency syndrome has assumed epidemic proportions in many parts of the world, this both poses a further risk to young persons engaged in sexually exploitive activities and is often the cause of further stigmatization.

United Nations Children's Fund

[Original: English]
[26 August 1994]

41. UNICEF is extremely concerned about the effect of such practices as the sale of children, child prostitution and child pornography on children, a fact which we underlined at the Commission on Human Rights in March of this year. We therefore welcome the debate on this issue and appreciate its far-reaching implications for the promotion and protection of children's rights and the health and well being of children - especially girl children - in both developing and developed countries around the world.

42. The importance attributed by UNICEF to these complicated issues is evident in the increasing emphasis placed by UNICEF offices on respect for the protection articles in the Convention on the Rights of the Child. In particular, our country offices are working closely with governments to ensure that those articles designed to protect children from sexual exploitation are implemented effectively.

43. In addition, UNICEF has contributed to the deliberations of the Special Rapporteur on the sale of children, child prostitution and child pornography (who is due to make his final report in early 1995) and to the Working Group on Contemporary Forms of Slavery. Clearly, this work will be enormously helpful to the intersessional working group, as will the reports of States parties which detail their progress toward implementing the Programme of Action on the Sale of Children developed by that Working Group.

44. Cooperating closely with the Committee on the Rights of the Child as it develops mechanisms for enforcing respect for these rights, UNICEF would also be pleased to provide support and relevant information to the Working Group during the course of its deliberations on the need for a draft optional protocol.

United Nations Population Fund

[Original: English]
[29 August 1994]

45. With regard to guidelines, UNFPA does not have specific guidelines on the sale of children, child prostitution and child pornography. However, UNFPA has always been committed to issues pertaining to children. UNFPA is

collaborating with UNICEF in the development of a brochure on the Girl Child and is supporting a project executed by the International Council of Women of the production of six films and other awareness/information materials on violence against women and children through world trafficking in six countries - Ghana, Cameroon, Senegal, Indonesia, Bangladesh and a European country.

46. We would also like to mention that the final draft Programme of Action of the International Conference on Population and Development emphasizes the need to prevent and eradicate violence against women and children.

Office of the United Nations High Commissioner for Refugees

[Original: English]
[7 September 1994]

47. UNHCR welcomes this important initiative and strongly supports the optional protocol as envisaged in resolution 1994/90. This Office encourages any moves to eradicate the exploitation of children.

48. It is currently estimated that there are approximately 10 million refugee children; at least half the world's refugee population. UNHCR takes a special interest in the plight of refugee children, many of whom are unaccompanied, and who as a consequence of displacement are particularly vulnerable to human rights abuses, including those referred to in the above-mentioned resolution. In relation to refugee children, the Office has taken steps with a view to preventing the abuses referred to in the resolution.

49. The Executive Committee of the High Commissioner's Programme has referred to these problems with the aim of enhancing the protection and care of refugee children. In particular, it has adopted conclusions 1987 No. 47 (XXXVIII) and 1989 No. 59 (XL) on Refugee Children, and 1993 No. 73 (XLIV) on Refugee Protection and Sexual Violence. These conclusions note the particular problems of exploitation and abuse which may be faced by refugee children.

50. In 1994 UNHCR published its Guidelines on Protection and Care of Refugee Children. These guidelines incorporate the provisions of the Convention on the Rights of the Child as guiding principles for all UNHCR's work with refugee children.

51. The Guidelines and the conclusions are widely disseminated and have been brought to the attention of the UNHCR officers in the field and at headquarters. They are the basis of daily protection activities.

52. In all refugee situations, UNHCR attempts to ensure that the basic needs of refugees are fully met, thus reducing pressure on refugee women and refugee children to resort to prostitution in order to survive.

53. UNHCR promotes the prompt registration of all refugees, including refugee children and unaccompanied minors. Chapter 10 of the Guidelines on Protection and Care of Refugee Children is on "Unaccompanied Children". It emphasizes the need for careful registration and identification of children. Tracing of family members and guardians, and the provision of appropriate care for

unaccompanied minors are highlighted as priorities. Through its registration and care programmes, UNHCR monitors children who would otherwise be particularly vulnerable to removal for the abusive purposes referred to in the resolution.

54. In April 1994, UNHCR participated in the Working Group of the Hague Conference on Private International Law on the application of the Hague Convention on Intercountry Adoption to refugees and other internationally displaced children. UNHCR's particular concern is to see the safeguards contained in this new Convention explicitly extended to refugee children in order to discourage the unregulated adoption and trafficking of refugee children. UNHCR will continue actively to participate in future meetings on this issue.

55. At the operational level, UNHCR deploys Protection Officers to all field locations who, along with other UNHCR staff members, are responsible for the implementation of the policies and guidelines on refugee children. UNHCR makes a particular effort to sensitize its staff to the special protection needs of refugee children.

United Nations Educational, Scientific and Cultural Organization

[Original: English]
[12 September 1994]

56. UNESCO welcomed the initiative of the Commission on Human Rights to establish, in cooperation with the Committee and the Special Rapporteur on the sale of children, a working group to formulate guidelines for a possible optional protocol to the Convention on the prevention and eradication of the sale of children, child prostitution and child pornography.

57. UNESCO's major work for the Convention and by extension, towards preventing and eradicating the sale of children, child prostitution and child pornography, is preventive. Firstly, the Organization cooperates with other entities of the United Nations system in human development efforts and sponsors research on the economic, social, legal and cultural factors underlying child abuse. Secondly, the Organization is fully committed to the aim of "Education for all". Assistance to Member States in providing access to good quality basic education is a major factor in preventing the exploitation of children.

58. UNESCO takes note in particular of paragraph 10 of resolution 1994/90 adopted by the Commission on Human Rights, which encourages governments and national and international educational organizations, in particular the United Nations Educational, Scientific and Cultural Organization and the United Nations Children's Fund to develop programmes for the rights of the child.

59. Invited by the Committee on the Rights of the Child, UNESCO is already at work in this direction. The text of the Convention has been translated into several local languages and the Organization is funding illustrated versions

of the Convention for the use by children in schools. The Organization has also produced in Spanish a course on teaching the Convention for UNESCO animadores and UNESCO Clubs.

60. In accordance with the wish of the Commission on Human Rights, UNESCO, in cooperation with the United Nations Children's Fund, will endeavour to have the Convention adopted by Ministries of Education as a basic text in civics classes in primary schools.

61. At the invitation of the Korean National Commission for UNESCO and in cooperation with the Korean Women's Development Institute, UNESCO will organize in Seoul (May 1995) a meeting of experts on the question of prostitution and sexual exploitation of human beings. United Nations participation in this meeting has been invited.

62. A summary of recent UNESCO activities relevant to the promotion of the rights of the child and in this context to the celebration of the International Year of the Family, is enclosed*.

Council of Europe

[Original: English]
[12 August 1994]

63. Although the European Commission of Human Rights has dealt so far with cases concerning the protection of children, it has never been asked to deal with cases concerning the sale of children, child prostitution and child pornography.

64. However, in their jurisprudence concerning criminal prosecution of homosexual acts, the organs of the European Convention on Human Rights have had regard to the protection of children and minors and have therefore admitted that the national legislation lays down limits for the age of consent in this field (cf. the Dudgeon, Norris and Modinos judgements, as well as the Commission's decision on the admissibility of application No. 17279/90 of 13 May 1992, Zukrigl v. Austria).

III. COMMENTS SUBMITTED BY NON-GOVERNMENTAL ORGANIZATIONS

Action for Children Campaign

[Original: English]
[15 August 1994]

65. Action for Children Campaign wants to stress that in order to be effective at the international level the Commission should make every effort to draw up terms which as many States as possible could sign. Otherwise the optional protocol will have a low level of support and little real protection for children worldwide will be achieved.

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* Available for consultation in the files of the secretariat.

66. Bearing that factor in mind, as far as child prostitution is concerned, consideration must be taken of the so-called "age of consent" at which an individual may lawfully agree to engage in sexual intercourse. In the United Kingdom, for example, this "age of consent" is when a young person attains the age of 16 years. At that age he or she can also lawfully marry (although parental consent is required until the age of 18 is reached). Further, it has to be pointed out that in the United Kingdom it is not actually illegal to be a prostitute. These two factors therefore mean that a person could choose to work as a prostitute from the age of 16 onwards.

67. However, article 1 of the Convention recognizes this position as regards the "age of majority" and we would therefore strongly recommend that a similar recognition be accepted as far as child prostitution is concerned. As an organization we are opposed to all forms of prostitution, but we base our recommendation on the reality of the law. We draw attention to a question about the "age of consent" in the countries of the European Community: even the age of 14 years is not an unusual "age of consent" in Europe and in no country is 18 regarded as the lowest relevant age for consenting male/female sexual activity.

68. As these are initial views only, may we make an alternative suggestion that the Commission makes inquiries amongst States as to whether an agreement could be reached on an absolute lower age - say 12 or 13 - so that this age could be quoted in the optional protocol, below which child prostitution is acknowledged, internationally, as a crime.

69. We realize that neither of these suggestions conform with the approach which the Committee on the Rights of the Child used for its preliminary draft optional protocol on the involvement of children in armed conflicts (E/CN.4/1994/91). However, we feel that the eradication of child prostitution is so important that at this stage it might be well worth while adopting our pragmatic approach.

70. If the use of children in prostitution (and indeed pornography) could be outlawed at least where the child is, say, under 14 or 13 years, then many children will have the benefit of a large measure of protection throughout the world.

71. In short we are suggesting that some measure of agreement, in this particular area of abuse and exploitation, by as many States as possible is preferable to little agreement by a few States.

72. With regard to the question of child pornography, we wonder whether it is practicable for the Commission to produce a definition of what actually is meant by "child pornography". In short, the Commission should consider the possibility of formulating a definition of child pornography. The reason we suggest this is that many States which have signed the Convention permit the production and export of material which involves children and yet is highly offensive and certainly pornographic.

73. Without a minimum international standard of what is pornographic, it is very difficult to see how much further the present Convention can go to protect children from this form of exploitation. From our experience

pornographic material is often produced in close association with child prostitution and other forms of serious sexual offences committed against children. In addition, as there is evidence to suggest that some pornographic material involving violence towards children records the murder or death of children, pornography can constitute an extremely serious risk to children's lives. A basic definition of what constitutes child pornography would help to differentiate between what might be "acceptable" and what is absolutely unacceptable.

74. We believe that it has now become necessary to alert quite young children to the dangers to themselves of becoming involved with those who produce and market pornographic material and to include a definitional statement in the optional protocol would greatly assist in the educational work amongst vulnerable children.

75. Involvement in pornography poses a serious threat to the mental, physical and spiritual development and health of children and its eradication is a major challenge to the world community.

Defence for Children International and International Catholic Child Bureau

[Original: English]
[15 August 1994]

76. In common with the other members of the NGO Group for the Convention on the Rights of the Child, Defence for Children International and the International Catholic Child Bureau are fully conscious of the extent of these problems and of the urgency of effective action, but have none the less questioned the sagacity, at the present moment, of proceeding to draw up such an optional protocol. This position paper sets out to explain to the working group the essential reasons for our hesitation.

1. Current standards

77. A number of binding international texts tackle the issues of sale and sexual exploitation of children, which has been high on the agenda of the United Nations since the latter's foundation. Particularly noteworthy are the following.

The 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others

78. This treaty had been ratified by 70 countries as at 30 June 1994. Essentially, it obliges States parties to punish any person who, "to gratify the passions of another, [p]rocures, entices or leads away another person for purposes of prostitution" or "exploits the prostitution of another person", even with the consent of that person. Also punishable is the running of a brothel and renting accommodation for the purpose of the prostitution of others. The treaty stipulates that such offences are to be regarded as extraditable or, in States where extradition is not permitted, that nationals who have returned to their own State after the commission abroad of any such offence are to be prosecuted in and punished by the courts of their own State.

The Convention then sets out procedures for international cooperation in this regard and in order to prevent international traffic in persons (especially women and children) for the purpose of prostitution.

79. Although this treaty is not specifically child-oriented, it does set out a number of pertinent principles and standards, two of which are particularly worth highlighting here:

(a) Exploitation can occur even when consent has been given; consequently, age of consent in any given country is immaterial in determining whether or not exploitation has taken place, and has no incidence on the definition of a child, i.e. it is not an element in determining a form of "majority" (cf. the 1989 Convention on the Rights of the Child, below).

(b) Within the admittedly limited contexts of procurement for prostitution and brothel management, there already exists an obligation to extradite or prosecute persons committing offences in foreign countries.

The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery

80. This treaty had been ratified by 112 countries as at 30 June 1994. Its most pertinent provision is article 1, which obliges States parties to "take all practicable and necessary legislative and other measures" to combat, inter alia, "any institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour".

The 1989 Convention on the Rights of the Child

81. This Convention, ratified by 165 countries as at 15 August 1994, defines a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier". It contains a number of provisions relevant to the issues under consideration. "States Parties shall take all appropriate legislative administrative, social and educational measures to protect the child from maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child" (art. 19). Under article 32, "States Parties recognize the right of the child to be protected from ... performing any work that is likely to be hazardous or ... to be harmful to the child's health or physical, mental, spiritual, moral or social development", and they are bound to "[p]rovide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article". Article 34 stipulates that "States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse" and to "take all appropriate national bilateral and multilateral measures to prevent: (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or any other unlawful sexual practices; (c) the exploitative use of children in pornographic performances and materials". Similarly article 35 obliges States Parties to take "all

appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form".

82. In summary, it can be said that, in international law, there already exists clear consensus on the right of the child (up to the age of 18 years) to be protected from all forms of sexual exploitation as well as from all forms of sale and trafficking whatever the purpose, with concomitant obligations on the part of States.

2. Implementation plans and mechanisms

Working Group on Contemporary Forms of Slavery

83. The Working Group on Contemporary Forms of Slavery reports to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which in turn submits its recommendations to the Commission on Human Rights. Since neither the 1949 Convention nor the 1956 Supplementary Convention contains provisions setting up a monitoring mechanism, the Working Group has been entrusted with this task, in addition to considering all other aspects of "contemporary forms of slavery" including sale, trafficking and sexual exploitation. There are currently efforts aimed at securing greater powers for the Working Group dealing with these questions, which we believe should be supported strongly.

Programme of Action on the Sale of Children, Child Prostitution and Child Pornography

84. It was through the Working Group on Contemporary Forms of Slavery, and with considerable NGO input, that this Programme of Action was developed and presented to the Commission on Human Rights in 1992, where it was adopted. It sets out a global framework for action at the national, regional and international levels, in spheres ranging from legislation to education and information. It is addressed in priority to Governments, but also requires cooperation from intergovernmental bodies and non-governmental organizations, from local to international.

Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography

85. In 1990, the United Nations Commission on Human Rights appointed a special rapporteur on the sale of children, child prostitution and child pornography, whose initial mandate was renewed for a further three years in 1992. His brief is not only to give updated annual reports to the Commission on the situation and developments in the fields covered by the mandate, but also to recommend responses at all levels and to request information from Governments on specific cases brought to his attention where violations of children's rights are alleged or proven. It can be noted that his investigation of the sale of children is in no way limited to sale for the purpose of prostitution or pornography, but for any purpose (adoption, labour, etc.). His mandate has consolidated concern and action in this field among organizations beyond the United Nations and its specialized agencies, for example, INTERPOL. He is due to make his final report in relation to this

mandate (which may be renewed) in early 1995. This report should constitute a landmark document, being based on five years of research, including field visits.

Committee on the Rights of the Child

86. The Committee on the Rights of the Child devoted a day of its fourth session (in October 1993) to discussion on the question of exploitation, including sale and sexual exploitation. At its fifth session (in January 1994), the Committee finalized and adopted recommendations on the basis of those debates, notably picking up selected aspects of the Programme of Action and placing emphasis on, inter alia, the need for States to "consider ways of strengthening their cooperation and solidarity for the promotion of the rights of the child ... at the bilateral and regional levels". By taking up the problem in the context of what was only its second "thematic discussion", the Committee has demonstrated the importance it attaches to efforts to combat sale and sexual exploitation of children. It will certainly continue to monitor these phenomena closely during its review of State party reports, notably looking to see if they are acting upon its various specific recommendations in this sphere.

87. It may also be noted that, following its first "thematic discussion" in 1992, on children in armed conflict, the Committee proposed as one of its recommendations the drafting of an optional protocol on the question. It did not do so in the light of the debate on sale and sexual exploitation, and when informed of the decision of the Commission on Human Rights to recommend the establishment of a working group on an optional protocol in this regard, the Committee simply "took note" of that decision, signifying a somewhat unenthusiastic response.

3. Perceived drawbacks of the proposed optional protocol

88. At this stage we wish to re-emphasize our conviction that the sale and sexual exploitation of children are among the most important and urgent child protection problems to be tackled by the international community at this time. There are none the less several reasons for our reticence towards the idea of an optional protocol for doing so.

89. First and foremost, the adding of optional protocols to human rights instruments is a rather unusual course, especially when they deal with a single aspect of the treaty in question. Thus, the only optional protocols presently in existence are to the International Covenant on Civil and Political Rights (ICCPR). The first authorizes the Human Rights Committee to consider individual communications regarding any of the rights contained in the Covenant, and has been ratified by over 70 countries. The second relates to abolition of the death penalty, constituting upgrading of the standard set by the Covenant but it has only been ratified by 19 countries to date.

90. It is true that there are five current initiatives for other optional protocols. However, three of these, like the first protocol to the ICCPR mentioned above, relate to enhancing the monitoring of the entire treaty concerned (Convention against Torture, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of

Discrimination Against Women). One, like the second protocol to the ICCPR, seeks to upgrade existing norms (age of recruitment into the armed forces under the Convention on the Rights of the Child). The fifth, the proposed optional protocol on sale and sexual exploitation, would, it seems, be of a kind unknown to date: enhancing the implementation of, but not upgrading, selected provisions of a wide-ranging treaty. Indeed, the basic standards of the Convention relating to sale and sexual exploitation are uncontested (unlike those on armed conflict), and an optional protocol on their implementation would be tantamount to giving them priority over other rights contained in the Convention, which in principle would not be desirable.

91. Secondly, there is general consensus that careful consideration should be given to the likely benefits and impact of new treaties before a decision is made to draw them up. This outlook found clear expression, moreover, in United Nations General Assembly resolution 41/120, endorsed by the World Conference on Human Rights in 1993, which sought to place emphasis on finding ways and means to implement existing standards before setting new ones. In this particular instance, as noted above, the Programme of Action sets out such ways and means and the Convention on the Rights of the Child, with other treaties, provides the necessary standards. In addition, before deciding on the desirability of an optional protocol, it would be judicious to try to determine the likely ratification rate in order to assess its potential impact. It would seem that most countries that may wish to consider ratifying would have to make a fundamental modification in their laws and in their attitude towards prosecution of their citizens for offences committed outside the jurisdiction of their courts, and this could be a lengthy process too. A small number have taken, or are in the process of taking, such steps, but there appears to be strong resistance elsewhere to doing so. Unless conditions can be secured whereby an optional protocol will receive widespread support and ratification, it will remain ineffective in practice for a very long time. Since the problem is urgent, we believe there are alternative ways of tackling it more rapidly and more effectively.

92. Thirdly, although the scope of the proposed protocol is not finalized, judging from the preliminary steps of the initiative, it would seem to be destined to cover only a small area of the overall phenomena of sale and sexual exploitation of children: persons acting or operating outside the borders of their own country and, more especially, those engaged in so-called "sex tourism". The sexual exploitation of children in or from the less privileged countries by persons from economically rich nations is generally seen as particularly repulsive and is all too common, but it is far from constituting the total extent of such exploitation - or even its major component. Most sexual exploitation of children is perpetrated by their fellow-citizens. Equally, most transfrontier sale of children appears to be linked to labour and adoption. We believe that the international community must tackle all forms of sale and sexual exploitation, as foreseen in the Convention on the Rights of the Child and the Programme of Action.

93. Finally, and in connection with the previous point, we fear that an optional protocol on this specific problem is at risk of diverting concern and energy away from other aspects of the phenomena of sale and sexual exploitation. In particular, the comprehensive thrust of the Programme of Action, drawn up and adopted only recently after much effort and concertation,

is likely to be neglected as a guide for work to combat these phenomena. Governments are already reporting on the implementation of this Programme, and it would appear most desirable to build upon this reporting procedure. Furthermore, it would surely be appropriate to await the outcome of the investigations of the Special Rapporteur, and to envisage practical follow-up to his recommendations, before deciding to embark on such a major drafting exercise.

4. Recommendation

94. On the basis of the concerns outlined in this paper, Defence for Children International and the International Catholic Child Bureau respectfully urge the Working Group to consider in depth, as its first task, the overall desirability of an optional protocol, taking into account alternative measures to improve the protection of children from sale and sexual exploitation, including those alluded to in the present position paper.

The Salvation Army

[Original: English]
[8 August 1994]

95. The Salvation Army,

Considering the seriousness of sexual abuses of children and its increase in scandalous commercialization in spite of various efforts undertaken to fight against exploitation of prostitution and the traffic in persons,

Taking into account the alarming disparity between very poor and very rich and its consequences at national and international levels,

Recognizing the urgent need to address the situation by adopting measures, both at national and international levels, a number of NGOs, including the International Abolitionist Federation, consider and support an optional protocol to the Convention on the Rights of the Child as an effective instrument to prevent and eradicate the sale of children, child prostitution and child pornography,

Requests with other NGOs, including the International Abolitionist Federation, that in addition to the Programme of Action for the Prevention and Eradication of the Sale of Children, Child Prostitution and Child Pornography, the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, should also be strengthened by an additional protocol, which will include all contemporary forms of slavery: sale of children; illicit trade of human organs; sex tourism; sexual abuses and mass rape during army conflicts.